

Remarks:

The Applicant thanks Examiner Daniel L. Greene for his continued thorough examination of this application and for his helpful discussion during the interviews.

Interview Summary:

Applicant James W. Wieder met with examiner Daniel L. Greene for an Interview on Wednesday, Feb 3, 2010 beginning at ~2pm in the USPTO Knox building. According to the Examiner, the signature-authority was unable to make the Interview. Prior to the Interview, the Applicant had faxed informal discussion papers to examiner Daniel L. Greene. Discussion was held on the independent claims and prior art Plastina and Logan. During the Interview, the Examiner agreed that the next Office Action would be a Non-Final action. More details of the Interview are discussed in the sections that follow. The Applicant would like to thank the examiner for the very helpful Interview discussion.

The Applicant has written claims in a simpler and clearer form:

It should not be assumed that claims changes are simply made to overcome Office Action rejections/objections. There are many other possible reasons for making claim changes. As the Applicant expends additional effort on claim drafting, the Applicant may arrive at different and/or better and/or clearer ways to claim the invention. Such claim changes may result in different and/or broader elements/features than prior claims. In addition, to increase claim diversity and/or cover a wider diversity of infringement-settings and/or to save on additional claim fees, some claims may be canceled in-order to add newer/better/different claims.

Next Action can not be properly made Final:

The Office Action failed to show the specific sections where each of the Applicant's claimed elements can be found in the cited art. The Applicant respectfully submits that without such detail, the Office has failed to established a prima facie case of obviousness. Since a prima facie case was not established, the next Office Action can not be made final. The Applicant submits that a prima facie case was not established, for at least, the following detailed reasons.

For the independent claims, the Office Action did not indicate the specific locations in cited art Logan, where the Applicant's claimed elements could be found.

For the dependent claims, the Office Action only made a general statement of the examiner's opinion [“*Regarding claims 164-170, 174-176, 211-213, 217, 218 and 232-263, each of these claims sets forth ...*”]. These statements are a generalized opinion of the Examiner and do not meet the standards for establishing a prima facie case for a rejection. As one example of the rejection's deficiency, the Office has not even shown where the elements in each of the dependent claims can be found/suggested/implied in the cited references.

In summary, the Applicant was unable to find detail arguments for the rejection of the independent and dependent claims in the Office Action as required under “compact prosecution”. Applicant respectfully submits that these omissions amount to a failure to articulate a prima facie case of unpatentability and the burden to rebut this “rejection” has not yet shifted to the Applicant. Consequently, a next Office action rejecting these claims cannot properly be made final since only then would the Applicant be obligated to rebut the rejection, presuming that such an Office action sets forth a prima facie case. (See MPEP § 706.07(a)).

112 2nd paragraph Rejection:

The applicant has written simpler and clearer claims.

103 rejection (Plastina): - O.A. Page 10-12:

The Office Action had rejected claims under 103(a) “as being unpatentable over Plastina (6,941,324). The applicant respectfully traverses the rejection for at least the following reasons.

The Applicant respectfully respectfully submits that Plastina does not have/suggest/imply using the **details of control actions** that are defined in the Applicant's claims. Specifically, Plastina does not have/suggest/imply(at the least) the following elements in the Applicant's claims: :

***“capturing, at a user-device, details of control actions by a user on pieces or compositions;
wherein said control actions are user actions that:***

- *affect the playback of a piece or composition during its playback, or*
- *find or select a piece or composition, or*
- *designate a piece or composition for playback; “*

“a plurality of ratings associated with the user; wherein a rating, indicating a magnitude of preference of the user, is associated with each piece or composition; wherein the magnitude of the rating for the associated piece or composition was determined by using at least some of the details of said control actions by the user on the associated piece or composition”

The Office Action states that: *“Plastina is concerned with providing a highly customized and enjoyable "smart" playlists modified by the metadata collected from the users experience.”.*

Applicant respectfully submits that in Plastina a playlist may be created by *“one or more filters ..., to execute queries on the various databases”* which contain metadata parameters (Plastina col 17, ln 26-31). Plastina states: *“As an example, consider a playlist entitled "Songs I like that I've not heard of recent". This playlist can be created by a query for songs where the "User Rating> 4 stars" and "LastTimePlayed> 1 month".”*

Plastina states: *“The last played time parameter comprises the date or time that a particular piece of content was played or experienced by the user.”* (Plastina col 9, line 9-12). Note that each time a song is played, as part of one or more playlists, the *“LastTimePlayed”* parameter is automatically updated by the system. But, note that for the above query (*“Songs I like that I've not heard of recent”*) to work correctly, the parameter needs to be updated after the song as been *“heard”* by the user (e.g., after the song has been played back). Also, note that the update of the parameter will occur without the occurrence of any “control actions by the user” as in the Applicant's claims.

Similarly, consider the *“User_Playcount_Total”* parameter. Plastina states: *“The playcount total comprises the total number of times a particular piece of content has been played by the user.”* (Plastina col 9, lines 47-49). Again, note that each time a song is played, as part of one or more playlists, the *“User_Playcount_Total”* parameter is automatically incremented by the system. Again note that the update of the parameter will occur without the occurrence of any “control actions by the user” as in the Applicant's claims.

Apple iTunes includes a working example of “smart playlists” that can be used/experimented

with. When the Applicant used the Apple iTunes “smart playlist” capability on 7-17-2009, the “Last played” and “Playcount” parameters were updated as each song finished being played back (e.g., after the user has heard the song). In addition, when the playback of a song had started but was stopped or terminated by the user, before the song finished, the “Last played” and “Playcount” parameters were not updated by the system. This working example illustrates how the “Last played” and “Playcount” parameters are automatically updated/incremented without the occurrence of “control actions by a user” as in the Applicant's claims.

Hence, for these and other reasons, the Applicant respectfully submits that, the “Playcount” parameter and the other parameters suggested/implied in Plastina, are not “details of control actions by a user” as in the Applicant's claims.

In addition, since Plastina does not have/suggest/imply the use of “details of control actions by a user”, then Plastina also does not have the following element in the Applicant's claims: “***wherein the magnitude of the rating for the associated piece or composition was determined by using at least some of the details of said control actions by the user on the associated piece or composition***”.

Regarding the dependent claims, the Office Action states: “*Regarding claims 164-170, 174-176, 211-213, 217, 218 and 232-263, each of these claims sets forth a variation of the manner in which the rating is determined or the claimed invention. However, each of these limitations are either disclosed outright within the reference itself or can be considered obvious variants of collecting user “preferences” and as such would have been obvious to one of ordinary skill in the art at the time the invention was made because Plastina is concerned with providing a highly customized and enjoyable “smart” playlists modified by the metadata collected from the users experience.*”

This is only a general statement of the examiner's opinion. This statement does not meet the requirements for establishing a prima facie case for a rejection. As one example of the rejection's deficiency, the Office has not even shown where the elements in each of the dependent claims can be found/suggested/implied in Plastina.

The dependent claims depend on other base claims and are allowable as depending from an allowable base claim. These claims are also allowable for their own recited features which, in combination with those recited in a base claim, are neither disclosed nor suggested in the references

cited and applied by the Office.

103 Rejection (Logan 5,732,216) - O.A. Page 12-14:

The Office Action had rejected claims under 103(a) as being unpatentable over Logan. The applicant respectfully traverses the rejection for at least the following reasons.

The Applicant respectfully submits that Logan does not have/suggest/imply (at the least) the following elements in the Applicant's claims:

“a plurality of ratings associated with the user; wherein a rating, indicating a magnitude of preference of the user, is associated with each piece or composition; wherein the magnitude of the rating for the associated piece or composition was determined by using at least some details of said control actions by the user on the associated piece or composition;”

Regarding the independent claims, the Office Action did not indicate the specific locations in Logan where these elements could be found. In addition, during the Interview, the examiner was unable to point to specific portions of Logan where these elements could be found. The Applicant respectfully requests withdrawal of the rejections.

The Office Action failed to show the specific sections where each of the Applicant's claimed elements can be found in the cited art. Not presenting such details is unfair to the Applicant. The Applicant respectfully submits that without such detail, the Office has failed to establish a prima facie case of obviousness. Since a prima facie case was not established, the next Office Action can not be made final.

Regarding the dependent claims, the Office Action states: *“Regarding claims 164-170, 174-176, 211-213, 217, 218 and 232-263, each of these claims sets forth a variation of the manner in which the rating is determined or the claimed invention. However, each of these limitations are either disclosed outright within the reference itself or can be considered obvious variants of collecting user “preferences” and as such would have been obvious to one of ordinary skill in the art at the time the invention was made because Logan is concerned with organizing the program segments by subject*

matter and creating scheduled programming in accordance with preferences associated with each subscriber.”.

This is only a general statement of the examiner's opinion. This statement does not meet the standards for establishing a prima facie case for a rejection. As one example of the rejection's deficiency, the Office has not even shown where the elements in each of the dependent claims can be found/suggested/implied in Logan. Since a prima facie case was not established, the next Office Action can not be made final.

The dependent claims depend on other base claims and are allowable as depending from an allowable base claim. These claims are also allowable for their own recited features which, in combination with those recited in a base claim, are neither disclosed nor suggested in the references cited and applied by the Office.

Summary:

The applicant has written simpler and clearer claims. Claims 163-170, 174-176, 211-213, 217-218 and 232-263 are pending. The number of total claims is unchanged. The number of independent claims is unchanged.

The undersigned wishes to make it clear that not making arguments or other additional arguments at this time, should not be construed as a concession or admission to any statement in the Office Action. The applicant is not conceding any claimed subject matter and reserves the right to prosecute any matter in canceled or amended claims; in future prosecution and/or continuing application(s).

The applicant respectfully requests reconsideration of this application. The applicant believes the application as amended is in condition for allowance. The applicant respectfully requests that a timely Notice of Allowance be issued in this case. If the Examiner believes a telephone conference would expedite or assist in the allowance of the present application, the Examiner is invited to call the Applicant.

Respectfully submitted,

/James W. Wieder/ (e-signature) Feb 11, 2010

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